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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES M. KINDER,

Plaintiff,

vs.

HARRAH'S ENTERTAINMENT, INC. and DOES 1 through 100, inclusive,

Defendants.

CASE NO. 07 CV 2226 DMS (POR)

Judge: Hon. Dana M. Sabraw
Mag. Judge: Hon. Louisa S. Porter

SPECIALLY APPEARING DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS PURSUANT TO F.R.CIV.P. RULE 12(b)(2), (6)

ACCOMPANYING DOCUMENTS: DECLARATION OF RONALD R. GIUSSO; OBJECTIONS AND MOTION TO STRIKE DECLARATION

Date: January 7, 2008
Time: 10:30 a.m.
Courtroom: 10

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I.

INTRODUCTION

Few litigants are as notorious in San Diego as former attorney JAMES M. KINDER. Of course, such infamy does not bar KINDER from the Courts, nor does it necessarily bar him from making a living by filing hundreds of questionable lawsuits every year. However, KINDER is not above the law. His purported representation by an attorney does not overcome the authority which compels, along with the facts, a ruling that KINDER has violated the Pre-Filing Order to which he is subject.

In addition, KINDER did not present a scintilla of admissible or competent evidence to meet his burden of showing this Court's proper exercise of personal jurisdiction over *Specially Appearing* Defendant. KINDER also does not dispute that he has sued the incorrect entity. For all of these reasons, KINDER's complaint must be dismissed.

II.

AN ATTORNEY-PLAINTIFF IS SUBJECT TO THE VEXATIOUS LITIGANT STATUTE IRRESPECTIVE OF WHETHER HE IS REPRESENTED BY COUNSEL

KINDER pays short shrift to the fact that he is a Court-ordered Vexatious Litigant. (Exh. 2.) KINDER does not dispute that he failed to seek permission from the Presiding Judge of the San Diego County Superior Court before filing the instant action. Instead, he asserts, dismissively, that the Pre-Filing Order does not apply in this case, because he is purportedly represented by a lawyer. Apparently, KINDER believes that he has found the magic trick which overcomes his legal requirement of obtaining a Pre-Filing Order - lawyer Chad Austin. In this regard, KINDER is simply wrong. He ignores the fact that California's vexatious litigant statute properly applies to attorney-plaintiffs (or, with respect to KINDER to disbarred attorney-plaintiffs) who are represented by counsel.[1] (*See, In re Shieh*, 17 Cal.App.4th 1154, 1166-1167 (1993);

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[1] In his Opposition, KINDER states that *In re Shieh* "has nothing to do with the facts of this case and any allegation to the contrary by Defendant will be wholly unsupported by any facts." (Oppo., p. 2:26-3:2.) KINDER's comment regarding *Shieh* is confused; of course, *Shieh* has no *res judicata* or collateral estoppel effect because of the facts of

Bravo v. Ismaj, 99 Cal.App.4th 211, 219 (2002); *see also*, *Camerado Ins. v. Superior Court*, 12 Cal.App.4th 838, 840 (1993).)

KINDER mistakenly relies upon an unpublished order entered by a former San Diego County Superior Court judge in a different case, with different parties and different facts, as having some sort of *res judicata* effect on the statutory mandate of a pre-filing order. An order from former Superior Court Judge Sammartino in the case of *James M. Kinder v. Adecco, Inc.* has absolutely no affect or precedential value whatsoever to this case, much less to the District Court's determination of whether KINDER is subject to a Pre-Filing Order in the present action.[2]

Simply because a former Superior Court Judge ruled in one of the many thousands of cases filed by KINDER, that a Pre-Filing Order was not applicable to a particular action, has no bearing on this case. It is unknown what Judge Sammartino knew at the time she entered the order and the basis of that order is not before this court. Judge Sammartino may not have been made aware of the authority that a plaintiff-attorney, represented by counsel, can be properly subject to the requirements of the Vexatious Litigant statute. (*See, Shieh*, 17 Cal.App.4th at 1166-1167; *see e.g.*, *Bravo,* 99 Cal.App.4th at 219; *Camerado Ins. Agency, Inc.,* 12 Cal.App.4th at 840.) She also may not have known that, in determining the applicability of the Vexatious Litigant statute (Cal. Code Civ. Proc. §391), the California Legislature defined a plaintiff as "a person," not as a person acting "*in propria persona*." (Cal. Code Civ. Proc. §391(d).) Moreover, "the legislative purpose [is] frustrated by a construction of the statute which would permit a vexatious litigant to avoid the

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the instant case. However, a California Court of Appeal case that held the Vexatious Litigant statute was not limited to an attorney's *pro per* activities, but rather would include litigation filed through counsel, in view of the attorney's history of drafting documents filed on his behalf by other attorneys and using those attorneys as mere puppets – is directly on point and should not be so blithely ignored by KINDER.

[2] "When determining the preclusive effect of a state court's judgment, this Full Faith and Credit Statute, 28 U.S.C. sec. 1738, requires that this Court apply the law of the state rendering the judgment. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). Therefore, the Court will apply the California law of collateral estoppel … The doctrine of collateral estoppel, or issue preclusion, 'bars a party from relitigating an issue identical to one he has previously litigated to a determination on its merits in another action. *Ross v. International Bhd. of Elec. Workers*, 634 F.2d 453, 457 n. 6 (9th Cir. 1980). Under California law, the requirements for finding collateral estoppel include "'(1) a final judgment on the merits in the first action, (2**) identity or privity among the parties** in the first action and those against whom the estoppel is asserted, and (3) identity of the issue presented in the second action with one necessarily decided in the first.'" (citation omitted) (emphasis added) (*MCA Records, Inc. v. Charly Records*, 865 F. Supp. 649, 652-653 (C.D.Cal. 1994).)

protection afforded potential targets simply by obtaining counsel." (*Camerado*, *id.*; *see also*, *Muller v. Tanner*, 2 Cal.App.3d 438, 444 (1969) ("[t]he provisions of the vexatious litigant statute … do not preclude a stay or dismissal because an attorney is used in the action in which the motion is made.").)

KINDER ignores this authority and offers no competent evidence of whether the substantial facts of KINDER's "puppet-mastery" of his young attorneys (his *modus operandi*) were presented to Judge Sammartino in the other case. It is a matter of public record that KINDER, a former attorney convicted of a crime of moral turpitude, resigned from the State Bar of California to avoid disbarment resulting from his criminal conviction. (Giusso Decl., ¶10-12; Exhs. D-F.) Judge Sammartino was not presented with many of the other substantial facts concerning KINDER's *modus operandi*. For example, KINDER is well known by face in the Clerk's office of the San Diego County Superior Court. He routinely files his own papers and pays the filing fees – even for lawsuits in which he is purportedly represented by Attorney Chad Austin. (Giusso Decl., ¶13.)

Judge Sammartino may not have been aware that KINDER is represented in hundreds of pending lawsuits alleging purported violations of the Telephone Consumer Protections Act by one of only two attorneys: Chad Austin (a second-year attorney) or Chris Reichman (admitted to the California bar in August 2007). (*Id.* at ¶14.) Perhaps Judge Sammartino was also not made aware of the fact that both Attorneys list their "offices" as "3129 India Street" – real property which KINDER declares he owns and the same address that KINDER has operated Rainbow Rental Car out of for decades. (*Id.* at ¶7; Exh. B.) Maybe Judge Sammartino would have found it persuasive that the telephone number for both Attorneys Austin and Reichman's "offices" is answered "Rainbow" (as in Rainbow Rental Car) when one calls the number. (*Id.* at ¶8.) Or, perhaps the fact that the facsimile number listed on hundreds of pleadings in which KINDER is purportedly represented by Attorneys Austin and Reichman is actually registered to "James M. Kinder" would have been material to Judge Sammartino. (*Id.* at 9; Exh. C.)

Equally important, neither Attorney Austin, nor Attorney Reichman, who list their offices as "3129 India Street" have such offices registered with the State Bar of California. In fact, Attorney Reichman's address with the State Bar is an address in Portland, Oregon. (*Id.* at ¶15.) Indeed, KINDER's control over Attorney Austin has been verified by Mr. Austin himself. In a letter dated December 10, 2007, Attorney Austin states that he is employed as "house counsel for Rainbow Rent A Car". (Giusso Decl., ¶5; Exh. A.) Attorney Austin list KINDER's business address and telephone number (which is answered "Rainbow") as his own for the "Law Office of Chad Austin" on pleadings and letterhead. Austin also uses KINDER's facsimile number for the "Law Office of Chad Austin" and has KINDER file the pleadings and pay the filing fees himself for hundreds of lawsuits in which Austin is listed as attorney for KINDER. (Giusso Decl., ¶¶7-9, 13.)

KINDER's control over his attorneys is plainly illegal and *de facto* unauthorized practice of law by a non-attorney. (Bus. & Prof. Code §6125.) KINDER is no novice when it comes to using other attorneys' names on pleadings. Indeed, it is a matter of public record that his corporation, James M. Kinder, Inc. was a "personal injury legal administration corporation." (Giusso Decl., ¶16; Exh. G.) Apparently, KINDER negotiated settlements on behalf of personal injury clients, managed cases and employed attorneys whose names would appear on the pleadings for these cases. (Giusso Decl., *id.*) In fact, the bread and butter of Rainbow Rental Car used to be clients that KINDER would refer who needed temporary rental cars while their lawsuits or claims were pending. (*Id.*) These facts illustrate beyond a shadow of a doubt that KINDER is well versed when it comes to using other attorneys' names as a means to an end.

In a case directly on point, *Shieh*, the plaintiff was an attorney (now disbarred) who had filed innumerable complaints in federal and state courts, both *in pro per* and through counsel, most of which were based on substantially similar causes of action. (*Shieh*, 17 Cal.App.4th at 1166-67.) The Court determined the plaintiff to be a vexatious litigant and specifically held that it was "immaterial" whether he was represented by counsel. (*Id.* at 1166.)

> Subdivision (b)(4) of Code of Civil Procedure section 391 defines a vexatious litigant as a person who '[h]as previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.' **It is immaterial that Shieh presently is represented by counsel.**

(*Id.* (emphasis added), *citing*, *Muller*, 2 Cal.App.3d at 444.) The Court of Appeal went on:

> In short, it is clear that Shieh does not engage attorneys as neutral assessors of his claims, bound by ethical considerations not to pursue unmeritorious or frivolous matters on behalf of a prospective client. (Cf., *Taliaferro v. Hoogs*, 236 Cal.App.2d 521 527 (1965).) Rather these attorneys who ostensibly 'represent' Shieh serve as mere puppets. Based on these facts, we conclude a prefiling order limited to Shieh's *in propria persona* activities would be wholly ineffective as a means of curbing his out-of-control behavior.

(*Id.* at 1167.)

Similarly, in this case, there is significant evidence that KINDER controls not only the litigation but also these young attorneys who purport to have offices at KINDER's business, who allow KINDER to file his own pleadings, pay his own filing fees, etc. It is KINDER's burden to establish that his complaint alleges facts sufficient to state a claim, and he has failed to set forth any competent evidence, or legal authority that should grant him a "get out of jail free" card and absolve him of the requirements of the Pre-Filing Order indisputably in place. For all of these reasons, KINDER is a vexatious litigant who has failed to abide by the requirements of the Pre-Filing Order and his Complaint should be dismissed forthwith.[3]

III.

KINDER MIS-CITES THE LAW ON PERSONAL JURISDICTION AND FAILS TO MEET HIS BURDEN TO ESTABLISH BY COMPETENT EVIDENCE THE PROPER EXERCISE OF PERSONAL JURISDICTION OVER *SPECIALLY APPEARING* DEFENDANT

KINDER does not argue or provide any evidence for this Court's exercise of general personal jurisdiction over *Specially Appearing* Defendant. And, with respect to specific personal jurisdiction, KINDER confusedly argues (in no less than 26 headings and subheadings) that "the Court need only determine whether the facts alleged, if true, are sufficient to establish jurisdiction" (Oppo., p. 4:26-5:1), after which he argues liability.[4] (*Id.*)

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[3] Alternatively, if this case were not dismissed, it is respectfully requested that the Court impose the requirement that KINDER post a security in the amount of no less than $20,000, pursuant to the Vexatious Litigant statute. (Cal. Code Civ. Proc. §391.1.)

[4] Of course, liability has no place in the jurisdictional analysis, and KINDER cites no authority for the proposition

The law on specific jurisdiction is, without a doubt, well established - specific jurisdiction cannot be found unless it is shown by **competent** evidence that the defendant has purposefully availed itself of forum benefits and the "controversy is related to or arises out of a defendant's contacts with the forum." (*See, Burger King v. Rudzewicz*, 471 U.S. 462, 472-473 (1985); *Helicoptores Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).) Once the plaintiff establishes those first two prongs of the specific jurisdiction test – and it is the plaintiff's burden to do so – then the third prong analyzes whether the Court's exercise of personal jurisdiction over the defendant would be reasonable. (*Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984).)

A. Purposeful Availment.

KINDER'S initial burden is to establish that *Specially Appearing* Defendant purposefully availed itself of the privilege of conducting activities in the forum. (*Keeton*, 465 U.S. at 774.) To meet this burden, KINDER presents evidence that is easily summed up:

- A single, 4-year old telephone call purportedly made to KINDER's paging number of (619) 999-9999 on behalf of "Harrah's Rincon Casino" that is attested to by his attorney Chad Austin who listened to a tape recording. (Austin Decl., ¶4.)

Of course, neither KINDER nor Attorney Austin have any clue who made the alleged telephone call, whether it was made by the Rincon San Luiseno Tribe of Mission Indians (the tribe that owns the Rincon Casino) or some other entity, and, instead, suggest: "discovery will ultimately be required in order to determine exactly which Harrah's entity operates the Harrah's Rincon Casino." (Austin Decl., ¶4.)

- A single telephone call purportedly made to KINDER's paging number of (619) 999-9999 on or about February 15, 2007 from someone named "Scott with Harrah's Entertainment"

Again, this "evidence" is not competently attested to by KINDER's attorney, Chad Austin who allegedly listened to a tape.[5]

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that it does.

[5] Such "evidence" is objectionable on multiple levels, not the least of which is hearsay, as Attorney Austin is

To support the purposeful availment prong, KINDER recites "evidence" including a North County Times newspaper article, and Attorney Austin's review of various web pages from such websites as the Rhode Island General Assembly's website, and the "Harrah's" website. (Austin Decl., ¶¶7-9.) It is not far-fetched to view this "evidence" as simply the results of a Google search of the words "Harrah's Entertainment" performed by KINDER. Whatever it is, it falls far short of KINDER's burden to establish by competent evidence that *Specially Appearing* Defendant purposefully availed itself of any of the benefits or privileges of conducting business in California. (*See*, *Keeton*, 465 U.S. at 774.)

Neither KINDER nor his "attorney" have set forth a single piece of competent evidence (that is not lacking in foundation, is hearsay, or is laughably irrelevant) that shows the only named defendant in this lawsuit – Harrah's Entertainment, Inc. – performed any act in California, had anything to do with these hearsay telephone calls, or, much less, purposefully availed itself of the privileges or benefits of conducting business in the State of California.

To the contrary, *Specially Appearing* Defendant has provided competent evidence that it does not have offices in California; does not own property in California; does not have employees in California; and, does not conduct business in California. (Kostrinsky Decl., ¶ 2.) Moreover, *Specially Appearing* Defendant does not make telemarketing or other telephone calls to individuals in California using an automatic telephone dialing system, artificial or prerecorded voice, or otherwise. It also does not have employees who do this. (*Id.* at ¶3.)

KINDER would have this Court believe that in evaluating this evidence, the Court must give complete and total deference to the paper-thin "evidence" submitted by KINDER. (Oppo., p. 5: 21-24.) That is not the standard. There is no dispute and no factual conflict about whether Harrah's Entertainment, Inc. conducts business in the State of California, or made telephone calls or had any employee make telephone calls to KINDER, because KINDER has failed in his burden to present any **competent evidence** of such facts. KINDER's internet searches notwithstanding,

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apparently offering the evidence to support the fact that someone named "Scott" really made this mystery telephone call. All of the bases for objection to the Declaration of Chad Austin are set forth fully in the accompanying Objections and Motion to Strike, filed concurrently herewith.

he has presented no evidence whatsoever that *Specially Appearing* Defendant committed any act or purposefully availed itself of the privileges of conducting business within the forum state.

B. Relatedness.

Under the second prong of the specific jurisdiction analysis, KINDER argues what can only be described as a whopping conclusion: "Plaintiff meets this prerequisite for the establishment of personal jurisdiction."[6] (Oppo., p. 12:19-20.) That's it. To meet his burden to satisfy the second prong of the jurisdiction analysis, KINDER offers no argument, no authority and not a single fact: rather, just a one-sentence conclusion.

In other sections of the brief, apparently directed at the question of purposeful availment, KINDER argues that the quantity of telephone calls – attested to incompetently by Attorney Austin[7] – answers the question of whether KINDER's claims arise out of *Specially Appearing* Defendant's contacts with the forum state. The problem is KINDER's Grand Canyon-wide leap in logic, that Harrah's Entertainment Inc. is responsible for the purported telephone calls. Without any competent evidence attesting to that fact, KINDER's argument is stripped to its barest essential: a lawsuit by a quintessential Vexatious Litigant directed at Harrah's Entertainment, Inc. because "some guy named Scott from Harrah's" supposedly called KINDER's paging number. Such evidence is not enough to satisfy KINDER's burden that his claims arise out of *Specially Appearing* Defendant's contacts with the forum state.[8]

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[6] KINDER's opposition itself does not treat the jurisdictional test in a three-prong analysis. Instead, the Opposition bounces around from commenting upon a "substantial connection" (language suggestive of the General Jurisdiction test, which he does not argue should apply), to minimum contacts, while intertwining argument concerning liability and citing a slew of District Court cases from such far-flung jurisdictions as Alabama, Mississippi, Illinois, Connecticut, Arizona and Virginia.

[7] One wonder why KINDER has not submitted a declaration attesting to the foundation and validity of the telephone calls, if he was the one who actually received the calls.

[8] KINDER throws out an argument that perhaps the alleged telephone calls were made by a third party for which *Specially Appearing* Defendant would be liable. (Oppo., p. 10.) This argument appears to be dangling from a thinner evidentiary thread than the others as there is not even a single fact in Attorney Austin's declaration providing any "evidence" concerning this mystery "third party."

C. Reasonableness.

The Court only reaches the question of whether it is reasonable to exercise personal jurisdiction over *Specially Appearing* Defendant if KINDER has met his burden to establish the first two prongs of the specific personal jurisdiction test (which he has not). (*See*, *Vons Companies Inc. v. Seabest Foods, Inc.*, 14 Cal.4th 434, 449 (1996).) In any event, there are several factors on the "reasonableness" prong for which KINDER assumes speciously that he has established by competent evidence any act whatsoever by *Specially Appearing* Defendant. In addition, KINDER gratuitously mentions such terms as "telephone terrorism" supposedly captured from the Congressional record. Such hyperbole has nothing to do with whether or not it is reasonable for this Court to exercise personal jurisdiction over *Specially Appearing* Defendant.

As to the burden on the defendant in defending in the forum, KINDER cites 50-year old Supreme Court authority that hails advances in "modern transportation." (*See*, Oppo., p. 13:18-24.) KINDER also argues in conclusory fashion that there is no conflict between trial of this action in California or Delaware (why KINDER does not believe the action could be tried in Nevada, where *Specially Appearing* Defendant has its principal place of business is unknown); and, without any fact to support it, that it would be more efficient to try the case in California. (*Id.* at pp. 15-16.)

What is clear, is that as a matter of fairness, a defendant should not be "hailed into a jurisdiction solely as the result of 'random,' 'fortuitous,' or 'attenuated' contacts." (*Burger King Corp.*, 471 U.S. at 475.) Even if KINDER presented competent evidence that *Specially Appearing* Defendant had anything to do with the alleged telephone calls attested to in Attorney Austin's declaration, such piecemeal "contacts" appear to fit the definition of "attenuated" contacts that are *per se* unreasonable to establish this Court's exercise of personal jurisdiction over *Specially Appearing* Defendant. Moreover, subjecting *Specially Appearing* Defendant to jurisdiction in California when they do not conduct business in the forum, do not have offices in California; do not own property in California; and do not have employees in California would place an enormous burden on defendant. Such a ruling would allow any vexatious plaintiff, in any location, to sue a defendant even when that defendant does not conduct any business in the forum. Such a result is *per se* unreasonable and requires dismissal of KINDER's complaint.

IV.

KINDER'S OPPOSITION IS SILENT AS TO WHY HE NAMED THE WRONG ENTITY IN THIS LAWSUIT

As set forth fully in *Specially Appearing* Defendant's moving papers, KINDER has named the wrong entity, which owes KINDER no duty of care. (*See*, *Specially Appearing* Defendant's Points and Authorities in Support of Motion to Dismiss, Sec. III(C).) Accordingly, KINDER's complaint must be dismissed pursuant to F.R.Civ.P. Rule 12(b)(6). Inasmuch as KINDER has presented no "cognizable legal theory" or evidence to dispute that *Specially Appearing* Defendant owes KINDER no duty of care, his complaint must be dismissed. (*See*, *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990).)

V.

CONCLUSION

This Court should not turn a blind eye to the unmistakable facts that KINDER is attempting to use Attorney Austin as a "get out of jail free" card, so he does not have to abide by the requirements of the Pre-Filing Order, which he has violated in this case. Moreover, KINDER has offered no competent evidence to satisfy his burden that this Court may properly exercise personal jurisdiction over the named defendant in this case. KINDER's "evidence" in this regard is nothing more than his "attorney's" hearsay comments regarding tape recordings, and what is obviously the result of an internet search using the words "Harrah's Entertainment." For all of these reasons, KINDER's complaint must be dismissed.

SHEA STOKES, ALC

Dated: December 28, 2007

By: /s/Ronald R. Giusso
Maria C. Roberts
Ronald R. Giusso
Attorneys for *Specially Appearing* Defendant